SUPREME COURT, U. S.
DEC 23 1974
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1974

No. 74-792

GAFTON I. CIURUS, et al.,

Petitioners

vs.

JACK NEW
TREASURER OF THE STATE OF INDIANA,

Respondent

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals

For The Seventh Circuit

John R. Vintilla
550 Hanna Building
Cleveland, Ohio 44115
Attorney for Petitioner

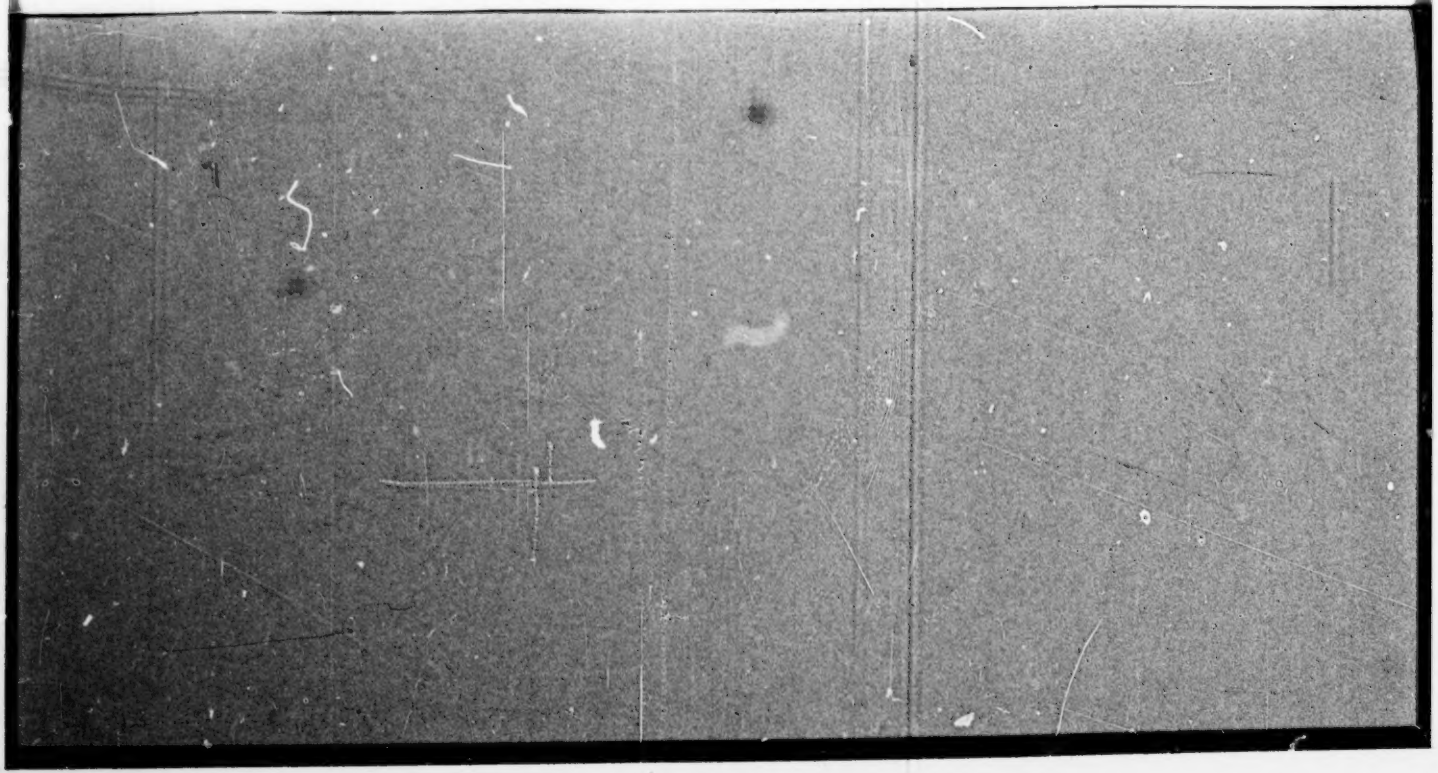

TABLE OF CONTENTS

Citations to Opinions Below 2

Jurisdiction 2

Questions Presented 2

Statutory Provisions Involved 4

Statement of the Case 4

Reasons for Granting of the Writ 10, 14

Conclusion 25

Appendix:

Complaint, U.S. District Court 26

Memorandum and Opinion, and Order, U.S. District Court 33

Order, U. S. Court of Appeals 41

Burns, Indiana Statutes Annotated, Sections 7-1112 (a)(b), and 29-1-17-12... 45

TABLE OF AUTHORITIES

Cases

Frazier v. Kutz, 139 F.2d 380 ..... 17, 18

Griffin v. Griffen, 327 U.S. 220 22

Lambert v. California, 355 U.S. 225, 228.. 24

Matter of Ruffalo, 390 U.S. 544 21

Societe Internationale v. Rogers, 357 U.S. 197 25

State v. U.S. Steel, 12 N.J. 38, 45 95 A 2d 734 17

Walker Process Equip. v. Food Mach. & Chem. Corp., 382 U.S. 172 11

Zschernig v. Miller, 389 U.S. 429 10

Other

Burns Indiana Statutes Annotated, Section 7-1112(a)(b) and 29-1-17-12 16

28 U.S.C. Section 1254(1) 2

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1974

NO.

GAFTON I. CIURUS, et al.,
Petitioners

-vs-

JACK NEW,
TREASURER OF THE STATE OF INDIANA,
Respondent

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For The Seventh Circuit

The Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled cause on October 3, 1974.

OPINIONS BELOW

The Court of Appeals issued an unpublished order, and the District Court rendered a memorandum and opinion, unreported. Both appear in the Appendix hereto.

JURISDICTION

The order of the Court of Appeals for the Seventh Circuit was entered on October 3, 1974. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

The District Court held: "The only cause of action asserted by the plaintiffs is that their due process rights under the Fourteenth Amendment have been violated." and, thereupon found and held, "Since

plaintiffs cannot assert Fourteenth Amendment rights, they have failed to state a claim upon which relief can be given and the complaint must be dismissed pursuant to Rule 12(b)(6), Fed.R.Civ.P."

The Court of Appeals, in affirming the judgment below, stated: "Since the plaintiffs failed to assert their due process rights in the Jasper County Circuit Court in the almost two months between receipt of notice of the preliminary order of escheat and the reaffirmance of that order and since no appeal was taken from either of the state court decrees, we hold that the plaintiffs' action below is barred by the doctrine of res judicata."

1. Whether the Court of Appeals committed serious error in ignoring the

issue brought before it as to the propriety of the dismissal of the complaint for failure to state a claim upon which relief can be given, and, instead, in affirming the judgment below on a ground which was not ruled upon by the lower court and, therefor, not before it for review?

2. Whether the petitioners action below is barred by the doctrine of res judicata for failure to exhaust the state's appellate remedies in seeking the vindication of their Fourteenth Amendment rights?

STATUTORY PROVISIONS INVOLVED

Burns, Indiana Statutes Annotated, Section 7-1112 (a)(b) and 29-1-17-12.

STATEMENT OF THE CASE

The petitioners, as citizens and residents of Romania, filed their complaint

pursuant to Title 28 U.S.C.A. Sections 1331(a) and 1332(a) (2) against the Treasurer of the State of Indiana to recover certain funds which belonged to the estate of Thomas Ciurus, deceased, and were escheated to the State of Indiana.

The plaintiffs and defendant each filed a motion for summary judgment and the defendant also filed a motion to dismiss the complaint pursuant to Rule 12, Fed.R.Civ.P. The District Court granted the motion to dismiss on the ground that the safeguards of the Fourteenth Amendment to the Constitution of the United States are not accorded to citizens of a foreign country, not resident in the United States. However, the lower court went on to state that the due process rights of the plaintiffs were not violated.

The factual statements are set forth in the Complaint. The petitioners are the sole

heirs of Thomas Ciurus who died intestate and whose estate was administered in Jasper County, Indiana. They empowered Attorney John R. Vintilla of Cleveland, Ohio, to represent them with regard to their rights in and to the estate of the decedent. The attorney for the administrator of the estate was notified promptly of the relationship of the petitioners and of the representation of their interests by legal counsel. Thereafter, duly executed and authenticated powers of attorney and heirship documents were forwarded to the attorney for the fiduciary. These documents were prepared by, executed in the presence of, certified by the State Notary in Romania, and authenticated by the appropriate governmental officials, including the Consul of the United States in Bucharest, Romania.[1]

In due course the administrator petitioned the court for a determination of the heirs of Thomas Ciurus and informed counsel for the petitioners of the filing and of the date of the hearing thereof. Prior thereto, the attorney for the administrator wrote to petitioners' lawyer, among other things, as follows:

> ". . As soon as you have the information on the heirs as to substantiate their interests, please let me know and I will prepare a petition to determine heirship, at which time this material may be presented to the court. I personally see no problems with regard to it as long as the heirship is substantiated. We did, when the estate was opened, contact the Attorney General of the State of Indiana's office and advised them of the situation and they

[1] According to the laws of Romania, the State Notary is an integral part of the Ministry of Justice. He is entrusted with the administration of decedents' estates and has jurisdiction of other legal matters. He is a lawyer appointed to that office by the Minister of Justice, under whose jurisdiction he operates.

have been kept advised as to the developments in the estate. It appeared for a while that perhaps the State of Indiana would recover the estate by escheat. It appears that it will not be the case now, but nevertheless we should keep them advised." (par.5, Complaint).

In view of the authenticated documents establishing the heirship of the petitioners which were filed with the court, the recognition of the petitioners as the heirs by the administrator and the representation of his counsel as hereinabove set forth, the petitioners' counsel did not appear at the hearing on the petition to determine the heirs of the decedent, Thomas Ciurus. Thereafter, to their complete surprise, they learned that the Court, at the hearing to determine heirs, found that the decedent died intestate without heirs, and, thereupon and instanter, ordered the property of the estate to escheat to the State of Indiana. The petitioners did not have any notice

whatsoever that the court would hear and determine a claim for escheat in connection with the hearing on the petition to determine heirs. Moreover, the State of Indiana had not made or filed a claim for escheat, of which the plaintiffs had notice or knowledge.

The petitioners subsequently filed their complaint in the United States District Court for the Northern District of Indiana, Hammond Division at Lafayette, pursuant to Title 28 U.S.C., Section 1331(a) and 1332(a) (2) against the Treasurer of the State of Indiana to recover the funds of the estate of their decedent which were improperly escheated to the State. The complaint alleges that the conduct and action of the State Court violated the petitioners' Fourteenth Amendment rights. The District Judge dismissed the complaint on two grounds. First, that the petitioners cannot

assert Fourteenth Amendment rights as non-resident aliens. Secondly, their proper remedy was to appeal within the state court system.

The Court of Appeals affirmed the judgment of dismissal of the District Court for the reason that the "plaintiffs action below is barred by the doctrine of res judicata."

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING STATE AND FEDERAL RELATIONSHIP WITH RESPECT TO THE PROTECTION OF FEDERALLY CREATED RIGHTS OF NON-RESIDENT ALIENS.

The injustices committed upon the non-resident friendly aliens in their claim to property in the United States which has been granted or secured to them by our laws are spread upon the record of the judicial authorities throughout our land. Some of the outrages have been made evident by this court in Zschernig v. Miller, 389 U.S. 429.

This court alone interposed itself between the states and non-resident claimants to protect them from unconstitutional action under color of state law.

The lower courts, in effect, have determined that the rights asserted in the complaint by foreign nationals are not proper subject for adjudication by a Federal Court, and that the exercise of Federal jurisdiction must be declined because the rights should have been litigated in the state court. This conclusion was reached under the guise of applying established legal principles. The District Court dismissed the action by reason of a motion to dismiss for failure to state a claim upon which relief can be given pursuant to Rule 12(b)(6), Fed.R.Civ. P. The motion under 12(b)(6) performs the same function as the old general demurrer in that it admits the well pleaded material allegations of the complaint, Walker Process,

Equip.v.Food Mach.& Chem.Corp.,382 U.S.172, but denies their legal sufficiency. In view of its ruling, the District Court did not and could not consider the affirmative defense of res judicata. The error assigned for review by the Court of Appeals and the record submitted in connection with the appeal involved the legal propriety of the dismissal order as the sole issue before the court. Nevertheless, the Court of Appeals affirmed the order of dismissal by reason of the doctrine of res judicata. We do not contend, as indicated below, that federal district courts should exercise state appellate jurisdiction. This is not our situation. The federal constitutional rights which are asserted here arise as a result of the action and conduct of the state court. The subject of this action has never been adjudicated on the merits by a court of competent jurisdiction. We agree that matters purely probate in

character are not within the jurisdiction of the federal courts. The question here, however, is not one of probate, but is to determine the right to property in the possession of the State of Indiana. It has been held consistently that where diversity of citizenship and the requisite jurisdictional amount are present, federal courts will determine a controversy involving the rights of a plaintiff to share in the res. The complaint does not relate to the authority of the State court to determine heirs, or to rule upon escheat in a proper proceeding, but is directed to the judicial action and conduct of a State Judge who subjected the rights of the petitioners to unconstitutional treatment. In passing upon the sufficiency of the complaint for purpose of the motion to dismiss, the court was required to assume that the well-pleaded allegations are true. The complaint shows that the peti-

tioners' federal constitutional rights have been infringed upon or violated. A federal judicial inquiry of such a charge is proper and imperative given the requisite jurisdictional basis.

THE STATE COURT DEPRIVED THE PETITIONERS OF THEIR RIGHTFUL CLAIM TO THE SUBJECT ESTATE IN VIOLATION OF THE LAWS OF INDIANA, AND CONTRARY TO THE PROVISIONS OF THE FOURTEENTH AMENDMENT.

The State of Indiana, as well as other states, in their generosity allow non-residents to inherit from a decedent's estate on the same basis as residents. The laws of descent and distribution in Indiana do not discriminate between a resident or a non-resident alien in his claim to the estate of an Indiana decedent. Thus, we see that Indiana accords all interested parties equal treatment before the law in the administration of a decedent's estate. The question, therefore, arises whether Indiana may deny or deprive a non-resident

alien equality of treatment in the enforcement of the rights granted and secured to him by the State. Obviously, the logical answer is in the negative. Yet, the rulings below, in effect, approved such a practice. Let us examine. On the one hand, Indiana would allow the petitioners to inherit the estate of our intestate decedent as the rightful heirs, but on the other hand, it denied them the safeguards of the laws to secure those rights. The petitioners submitted documentation, duly executed and authenticated, to establish their relationship to the decedent. The administrator, who had the primary responsibility to ascertain if there were heirs, recognized the claim of the petitioners and accepted their substantiation of same. As a result thereof, there was no reason to believe or know that the court, at the hearing on the administrator's petition to determine heirs, would not ac-

cept the documentation and the fiduciary's representation regarding the relationship of the petitioners. In any event, the State court had before it reasonable grounds to believe that the decedent did leave heirs at law who would be entitled to inherit his estate. In view thereof, the court was required at least to continue the hearing on the determination of heirs to afford the petitioners an opportunity to submit additional proof, or, in the alternative, to require the State, in seeking escheat, to satisfy the court by strong and convincing evidence that "after reasonable search" there are "no known heirs of the decedent", or that "any heir or claimant cannot be found".

The escheat statute of Indiana, Burns, Section 7-1112(a)(b), relevant hereto, provides:

> "(a) If after reasonable search, satisfactory to the Court, there shall be no known heir of the decedent.

. . . and "(b) If any heir, distributee, devisee, or claimant cannot be found after reasonable search, satisfactory to the court . . . "the estate shall escheat to the state."

The public policy of inheritance laws is to distribute property to the owners rather than to claim it by escheat. The escheat law is not like a statute that requires the forfeiture of property for some wrongful conduct. It is not designed to be an expropriation of property of foreign resident owners who are known and who can establish their property right to the fund. These principles are well established and generally accepted in all jurisdictions.

It is the settled rule that escheats and forfeiture are not favored by law, any doubt as to whether property is subject to escheat is resolved against the State, State v U.S. Steel Corporation, 12 N.J. 38, 45-95 A 2d 734. Relative to our problem, the court, in Frazier v Kutz, 139 F 2d 380, stated at page

383, as follows:

> "In every case of this nature there is a presumption of law that deceased left heirs, and this presumption obtains until the claimant by escheat overcomes the presumption by strong and convincing evidence."

It is implicit in the language of Indiana's laws of escheat that the aforementioned principles are controlling in applying the statute. It is important to note that the court is authorized to order escheat only if it is satisfied that no kindred capable of inheriting have been found after a reasonable search. Obviously, the ascertainment of the right to escheat involves a determination by the court that there is a complete failure of heirs at law or next of kin. According to the statute, escheat will not be permitted so long as a party legally authorized to inherit can be found. The court in our case had reasonable grounds to believe and to know

that there may be heirs in view of the official and authenticated documentation which was presented to it. Moreover, the fact that the administrator assumed the responsibility of presenting the documents to the court, without objection thereto, furnishes adequate proof that the party primarily responsible for distributing the estate to the rightful parties - the administrator - was satisfied that there were parties capable of inheriting. In any event, the court fell into serious error in ordering the forfeiture of the property claimed by these plaintiffs under the circumstances of this matter.

We are here concerned with the interpretation of the laws governing escheat and with the constitutional doctrine underlying such laws. Certainly, a substantial constitutional question is provoked by the state court's action of escheat. The provisions of the escheat statute of Indiana and the

court's action of escheat must be considered in light of the provisions of the Fourteenth Amendment that no person shall be deprived of property without due process of law or denied the equal protection of the laws.

The order of escheat was made at a hearing that was scheduled solely for the purpose of determining heirs. This was the only scope of the hearing at that time, at least insofar as the notice to the petitioners set forth. The Court, apparently, was of the opinion that the documents submitted to establish heirship were inadmissible, and, concluded therefrom, that the decedent left no heirs. The court then went on to decide that the estate must escheat, although the issue of escheat was not before the court at that time, and the petitioners had no notice or knowledge that the court would entertain a claim for escheat at that hearing. More

seriously, the petitioners were not accorded an opportunity to appear and to defend upon the claim of escheat. This is a classic example of a denial of procedural due process. (See In The Matter of Ruffalo, 390 U.S. 544).

We submit, under the provisions of the Indiana law, that the state treasurer is a mere trustee of the subject funds until the expiration of seven (7) years from the time of payment. The state becomes entitled to the estate of an intestate only where there is no heir capable of inheriting, and title to such property does not vest in the state until the expiration of a period of seven years after payment to the state treasurer. Thus, we see that Indiana law authorizes suit against the State Treasurer to recover the escheated property. Such a provision is common in an escheat statute.

The rationale of the lower court's decision is that a party whose documented claim

to a decedent's estate had been accepted by the fiduciary, and for which reason he did not appear at the hearing to determine heirs, is nevertheless deemed for the purposes of due process to be on notice of possible escheat in the same proceeding. This reasoning has been rejected by this Court in Griffin v Griffin, 327 U.S. 220. While it is true that the petitioners had notice of the heirship proceedings and an opportunity to appear therein, the order of escheat is constitutionally invalid when made without any prior notice that a claim for escheat would be made and would be acted upon by the court in connection with proceedings to determine heirs. The action of the state court cut off any opportunity for the petitioners to corroborate the heirship claim and denied them the right to resist and defend against the claim for escheat. These rights could not be rendered nugatory by a

failure to give them notice and to afford them an opportunity to be heard with regard thereto. It runs counter to the requirements of due process to make an order which undertook to prejudice the rights of a party in a way that he had no reason to expect. Certainly, the laws of Indiana do not provide that a claim for escheat must automatically follow a proceeding to determine heirs in the circumstances of our case. On the contrary, Indiana views escheat as a drastic measure in the traditional concept of established and accepted rules, and to be resorted to only when the court is satisfied that there is no heir who can be found to claim the estate. This is hardly the situation of the within cause. In addition, the law places the burden upon the State to establish the right to escheat by strong and convincing proof. Implicit in such a requirement is the right of a putative heir

to challenge the claim in a judicial proceeding of which he has notice and an opportunity to appear.

> "Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act". (underscoring supplied)
> Lambert v California 355 U.S. 225, 228.

The Court of Jasper County, Indiana, is charged with the duty of protecting and preserving the rights of all claimants of a decedent's estate. Basic thereto, is the correlative duty to notify all parties in interest of each and every proceeding that may affect their rights, and to afford them an opportunity to appear to protect their rights. The action of the State court was extremely drastic, unusually abrupt and grossly unfair. Fairness of procedure is one of the rudiments

of due process. This fundamental concept is the basis upon which every judicial action must rest. A judgment based upon conduct and action as is evident in our situation is constitutionally repugnant. See Societe Internationale v Rogers, 357 U.S. 197 at page 209.

CONCLUSION

The decision below is inconsistent with, and in disregard of, the constitutionally protected rights of the petitioners. The writ should issue to review the order of the Seventh Circuit.

Respectfully submitted,

John R. Vintilla
550 Hanna Building
Cleveland, Ohio 44115
Attorney for Petitioners

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, HAMMOND DIVISION AT LAFAYETTE. CIV. NO. 73 L 33

COMPLAINT

GAFTON A. CIURUS, et al.,
Plaintiffs

v.

JACK NEW. Treasurer of the State of Indiana,
Defendant

1) Plaintiffs are citizens and residents of Romania. They bring their action under Title 28, U.S.C.A., Sections 1331(a) and 1332(a)(2). The defendant is the Treasurer of the State of Indiana. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars.

2) The plaintiffs are the heirs at law of Thomas Ciurus, deceased, who died on or about September 28, 1970, a resident of Jasper County, Indiana. The estate of Thomas Ciurus was administered in the Circuit Court

of Jasper County, Indiana, be[redacted]cause number 4479 therein.

3) The plaintiffs, resp[redacted]vely, duly executed a power of attorney whereby they empowered and authorized John R. Vintilla, attorney at law, Cleveland, Ohio, to represent them, and to act on their behalf and in their name, place and stead in connection with and in regard to their rights and interests as heirs of Thomas Ciurus, deceased, and as distributees of the estate of said decedent.

4) The said attorney notified the administrator of the estate, and his attorney. of his representation of the heirs in Romania, and thereafter, the attorney for the fiduciary kept the attorney for these plaintiffs informed of all proceedings affecting their interests during the administration of the estate.

5) On March 10, 1971, Thomas G. Fisher,

the attorney for the administrator of the subject estate, wrote to the attorney for the plaintiffs, among other things, as follows:

> "It was a pleasure talking with you on the phone last Monday, and I thought I would bring you up to date in the matter of the estate. Enclosed please find a copy of the inventory filed showing the assets which Mr. Ciurus owned at his death. The contract noted has been compromised for the sum of $3,000.00 inasmuch that if the contract were to be paid out it would be eight or nine years before final payment would be made. This was done with Court approval. We plan now to sell the farmland above noted for not less than the appraised value. You will be receiving a notice of the hearing on the petition to sell real estate shortly, and, if you at that time have the power of attorney on behalf of the putative heirs of Thomas Ciurus, deceased, we would appreciate a waiver of notice and consent to the sale or, naturally, if you have objections to the sale those objections should be heard at the hearing. . As soon as you have the information on the heirs as to substantiate their interests please let me know and I will prepare a petition to determine heirship, at which time this material may be presented to the Court. I personally see no problems with regard to it as long as the heirship is substantiated. We did, when the estate was opened, contact the Attorney General of the State of Indiana's office and ad-

vised them of the situation and they have been kept advised as to the developments in the estate. It appeared for a while that perhaps the State of Indiana would receive the estate by escheat. It appears that it will not be the case now, but nevertheless we should keep them advised."

6) The plaintiffs, through their attorney, forwarded to legal counsel for the administrator, on July 2, 1971, copies, and on July 13, 1971, the originals of a set of documents consisting of a Declaration of Heirship and Powers of Attorney, all of which have been prepared and executed in accordance with the laws of Romania, and duly authenticated by the appropriate Romanian authorities and by the Consul of the United States of America at Bucharest, Romania, copies of which are annexed hereto, and made a part hereof, as though fully set forth herein, marked exhibits A, B, C and D. The documentation as evidenced by these exhibits were filed with the court in the subject estate.

7) At all times relevant to the admin-

intration proceedings of the estate, the administrator of the estate knew, or had reasonable cause to believe, that the plaintiffs are the heirs of the decedent as substantiated by the official documents referred to hereinabove.

8) On November 22, 1971, the petition to determine heirship, filed by the administrator of the estate, came on for hearing, at which time the court had before it the documentation referred to in paragraph 6, containing duly authenticated evidence setting forth the relationship of the plaintiffs to the subject decedent, that notwithstanding the fact that there were reasonable grounds to believe that the decedent did not die without heirs, the court, nevertheless entered a decree forthwith whereby it ordered that the net assets in the hands of the administrator be, and same were, distributed to the State of Indiana as escheated property.

Exhibit E attached hereto.

9) In view of the duly authenticated documentation before the court regarding the heirship of these plaintiffs, and the representations of the attorney for the administrator, as aforesaid, the attorney for the plaintiffs was caused to believe, and did believe, that it was not imperative to appear and, therefore, did not appear, at the hearing scheduled to determine heirs on November 22, 1971.

10) Plaintiffs had no reason to believe or to know, nor did they have any notice or knowledge, whatsoever, that a claim for escheat would be made, or that the court would entertain such a claim at the hearing of November 22, 1971, and therefore, they were afforded no opportunity to appear and to protect their rights against such a claim.

11) As a direct result of the aforementioned action of the court, the plaintiffs

were denied their rightful inheritance from the estate of Thomas Ciurus, that the total property which they would have inherited as sole heirs, but for escheat, was approximately twenty thousand dollars ($20,000.00), the exact amount being unknown to the plaintiffs for the reason that they did not receive a copy of the distributive account of the fiduciary.

12) The judgment complained of herein deprived the plaintiffs of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

Wherefore plaintiffs pray that this court determine that they are the rightful heirs at law of Thomas Ciurus, deceased, and, as such, entitled to the entire distributive estate, with interest at the legal rate from the date of escheat, for their costs herein, and for such other relief as may be just and proper in the premises.

UNITED STATES DISTRICT COURT
Memorandum of Decision and Order

This cause is before the court on plaintiffs' motion for summary judgment pursuant to Rule 56, Fed.R.Civ.P.,and defendant's motion for summary judgment pursuant to Rule 56, Fed. R.Civ.P., and motion to dismiss pursuant to Rule 12,Fed.R.Civ.P. Since this court has determined that the defendant's motion to dismiss will be granted, no decision will be reached on the motions for summary judgment. The facts as alleged in the complaint are as follows. Plaintiffs are citizens and residents of Romania. Plaintiffs claim to be the heirs of Thomas Ciurus, who died in 1970, a resident of Jasper County, Indiana. Plaintiffs executed a power of attorney whereby they authorized John R. Vintilla, an attorney, to reresent them and to act on their behalf in regard to their rights and interests in the estate of Thomas Ciurus. On November 22, 1971,

a hearing was held before the Jasper Circuit Court on a petition to determine heirship filed by the administrator of the estate of Thomas Ciurus. Although plaintiffs' attorney did not appear, the court had before it documentation regarding the heirship of these plaintiffs. These documents had been provided by plaintiffs' counsel and were presented to the court by Thomas G. Fisher, attorney for the administrator. The court decided that the documents were not sufficient proof of heirship and ordered the property of Thomas Ciurus be distributed to the State of Indiana. The instant action was filed on September 21, 1973, basing jurisdiction on 28 U.S.C.A. Sec. 1331(a) and 1332(a)(2). The complaint alleged that the Jasper Circuit Court deprived plaintiffs of their property without due process of law in violation of the Fourteenth Amendment. Plaintiffs' attorney had been advised

by the attorney for the administrator, Thomas G. Fisher, that he (Fisher) personally saw no problem with regard to determining heirship of the plaintiffs as long as such heirship was substantiated. Fisher also informed plaintiffs' attorney that it had formerly appeared that the State of Indiana would take the estate by escheat but that no longer appeared to be the case. Yet Fisher counseled keeping the State advised of developments nevertheless. Plaintiffs' attorney states that because of the above representations of Fisher and because the documents regarding heirship were before the court, he did not believe it was imperative to appear at the hearing to determine heirship. He claims that plaintiffs had no notice or reason to believe that a claim for escheat would be made. Therefore, it is alleged that plaintiffs were afforded no opportunity to appear and protect their rights against such

a claim. As a result, plaintiffs allege that they were deprived of their inheritance from the estate of Thomas Ciurus and that this deprivation violated their Fourteenth Amendment rights. On October 12, 1973, plaintiffs moved for a summary judgment on the ground that no issue of material fact existed and that plaintiffs had been denied due process as a matter of law.

On the same day, defendant moved to dismiss the action, stating that the court lacked subject matter jurisdiction, that plaintiffs failed to state a claim upon which relief can be granted, that the Eleventh Amendment prohibited suits of this nature, and that the court should abstain from hearing of a case of this nature. On November 21, 1973, defendant moved for summary judgment, asserting that the decision in the Jasper Circuit Court, from which no appeal was taken, was a bar to the instant action.

The only cause of action asserted by plaintiffs is that their due process rights under the Fourteenth Amendment have been violated. The relevant part of the Fourteenth Amendment provides that:

> . . . nor shall any State deprive any person of life, liberty or property, without due process of law. . . . (emphasis added)

The question presented to this court is whether the words "any person" grant due process rights to citizens of foreign nations not residing in the United States. This court concludes that plaintiffs cannot assert Fourteenth Amendment rights since the words "any person" apply only to citizens of the United States and aliens residing in the United States. Graham v. Richardson, 403 U.S. 365, 371, 91 C.Ct. 1848, 1951 (1971): Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064(1886); Cermeno-Cerna v. Farrell, 291 F. Supp. 521 (D. D. Cal. 1968). See also 3 Am. Jur. 2d

Aliens and Citizens Sec.8 (1962); 16 Am.Jur. 2d Constitutional Law Sec.558 (1964). Since plaintiffs cannot assert Fourteenth Amendment rights, they have failed to state a claim upon which relief can be given and the complaint must be dismissed pursuant to Rule 12 (b)(6), Fed.R.Civ.P.[1]

In addition, it is quite clear that plaintiffs were accorded due process in the hearing to determine heirship. He had been told that the State must be kept informed because it had a possible escheat claim.

---

[1]The Court has taken note of the Protocol to the Consular Convention Between the United States of America and the Socialist Republic of Romania attached to plaintiffs' brief in opposition to the motion to dismiss. However, the Protocol does not in any way alter the court's decision to dismiss the action. The decedent died in September 1970 and the decision of the Jasper Circuit Court which is challenged in the instant action was entered in November 1972. The Consular Convention did not enter into force until July 1973, well after the decedent's death and subsequent to the state court decision and does not apply to the instant action. Since

As an attorney he must have been aware that if no heirs were found, the property would escheat to the State. Knowing all this, he chose not to attend the hearing. When the court ruled adversely to his clients, he chose not to file a Motion to Correct Errors pursuant to Indiana Trial Rule 59 or to take an appeal. In light of the above facts, plaintiffs cannot be heard to say that they had no reason to believe that a claim for escheat would be made or that they were not afforded an opportunity to appear and protect their rights. If the Jasper Circuit Court erred, the proper remedy was an appeal within the state court system and not a suit in this court.

---

this action was brought solely under the Fourteenth Amendment, this court expresses no opinion as to whether plaintiffs have a viable cause of action under any international agreement between the United States and Romania.

For the above reasons defendant's motion to dismiss is granted. No decision is reached on plaintiffs' motion for summary judgment or defendant's motion for summary judgment. This cause is now dismissed.

Entered this 25th day of January, 1974.

/s/ Jesse E. Eschbach
District Judge

UNITED STATES COURT OF APPEALS
Seventh Circuit

October 3, 1974

ORDER

Plaintiffs are citizens and residents of Romania and claim to be the heirs of Thomas Ciurus, who died on September 28,1970, as a resident of Jasper County, Indiana. Plaintiffs authorized a Cleveland, Ohio lawyer to represent them with respect to the Ciurus estate. On November 22, 1971, the petition to determine heirship came on for a hearing. Plaintiffs' counsel had notice of the hearing but did not appear. On that date, a judge of the Jasper Circuit Court found that there was insufficient proof as to the heirs of the deceased and therefore held that the property escheated to the State of Indiana. A final decree to that effect was entered on January 17,1972. On July 24, 1973, the same court denied a petition

of the State Bank of Remington, Indiana, seeking to require the Treasurer of the State of Indiana to pay the escheated monies to the bank as receiver for the deceased's Romanian heirs. The Treasurer of the State of Indiana was a respondent to the petition for a receiver and was represented by deputy attorneys general of the State of Indiana. The present complaint was filed on September 21, 1973, almost sixty days after the denial of the receiver's petition.

The district court granted the defendant's motion to dismiss on three grounds:

1. Plaintiffs cannot assert that their due process rights were violated in the Indiana proceedings because the Fourteenth Amendment applies only to citizens of the United States and aliens residing therein.

2. Plaintiffs were accorded due process in the state proceedings.

3. If the Jasper Circuit Court erred,

the proper remedy was an appeal within the state court system.

Plaintiffs and the defendant treasurer were parties in the Indiana litigation. Since plaintiffs failed to assert their due process rights in the Jasper County Circuit Court in the almost two months between receipt of notice of the preliminary order of escheat and the reaffirmance of that order and since no appeal was taken from either of the state court decrees, we hold that the plaintiffs' action below is barred by the doctrine of res judicata. As the Second Circuit noted recently in a somewhat similar case, Lovely v. Laliberte, 498 F.2d 1261, 1263 (2d Cir. 1974), "(R)es judicata, (even in the context of constitutional claims), bars all grounds that might have been, but were not, presented to the state court." Furthermore, the Supreme Court, in Rooker v. Fidelity Trust Company, 263 U.S. 413, indicated that

federal district courts are not to exercise state appellate jurisdiction. Plaintiffs' remedy was in the Indiana courts.

Judgment affirmed.

BEFORE

THOMAS E. FAIRCHILD, Circuit Judge

WALTER J. CUMMINGS, Circuit Judge

WILBUR F. PELL, JR., Circuit Judge

(d) The moneys received by the state treasurer pursuant to the provisions of this section shall be paid to the person entitled on proof of his right thereto or in the case of an absentee, to the receiver of such absentee's property, or, if the state treasurer refuses or fails to pay because he is doubtful as to his duties in the premises, such person may apply to the court in which the estate was administered, whereupon the court upon noyice to the state treasurer may determine the person entitled hereto and order the treasurer to pay the same accordingly. No interest shall be allowed thereon and such distributee or claimant shall pay all costs and expenses incident to the proceedings. If such proceeds are not paid or no application is made to the court within seven (7) years after such payment to the

state treasurer, no recovery thereof shall be had.